In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 895

CHARLES KATZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. After a non-jury trial in the United States District Court for the Southern District of California, petitioner was convicted on all counts of an eight-count indictment charging him with making telephone calls on eight different occasions transmitting wagering information between Los Angeles and Miami and Los Angeles and Boston (18 U.S.C. 1084). On June 21, 1965, petitioner was sentenced to pay a $300 fine (Tr. I, 61). The judgment of the court of appeals

affirming the conviction was entered on November 17, 1966. The petition for a writ of certiorari, filed on December 22, 1966, is out of time under Rule 22(2) of the Rules of this Court.

2. Before discussing the issues raised in the petition we believe the following circumstances should be brought to the Court's attention. On June 22, 1966, after the conviction in this case, petitioner was brought before a grand jury in the United States District Court for the Southern District of Florida which was investigating unlawful interstate wagering. After having claimed the privilege against self-incrimination with respect to questions about telephone calls from Los Angeles to Miami in February 1965 (in part the subject matter of the present conviction), petitioner was informed by the government and the court that, if he did answer questions, he would be immune from prosecution under 47 U.S.C. 409(*l*). Petitioner nevertheless refused to answer and was adjudicated in civil contempt. However, on November 30, 1966, after the affirmance of the judgment in this case by the Ninth Circuit, but before the petition for a writ of certiorari was filed, petitioner did testify, under a grant of immunity, before another grand jury in the Southern District of Florida. His testimony covered, *inter alia*, the conversations which formed the basis of the present indictment.

It is arguable that, under *Frank* v. *United States*, 347 F. 2d 486 (C.A.D.C.), petitioner acquired immunity in November 1966, not only from future prosecution, but from the effect of the present con-

viction as well. There the court held that the immunity conferred by Section 409(*l*) applied to a conviction pending on appeal. Even assuming *arguendo* that the *Frank* rule would also apply after affirmance on appeal but before expiration of the time for petitioning for certiorari, we believe that *Frank* was wrongly decided and should not be applied here.

In our view, the statutory immunity is no broader than the privilege against self-incrimination itself. In a case such as this one, it cannot be said that any testimony by the witness could incriminate him with respect to the offense in question, since he has already been convicted of that offense. As this Court stated in *Reina* v. *United States*, 364 U.S. 507, 514, immunity statutes need not "do more than protect a witness from future prosecutions." There it was held that a witness who was serving a sentence could not decline to testify under a grant of immunity on the ground that he was not granted a pardon on the unserved portion of his sentence. As that decision recognizes, the purpose of the immunity statutes is to assure a witness that neither his incriminating testimony nor any evidence derived therefrom will be used against him in a criminal trial. This purpose does not require that the immunity relate back to a previous conviction, even if pending on appeal or certiorari.[1] Therefore, we believe that petitioner's act of testifying in November 1966 is without effect upon the present case.

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[1] Of course, if the conviction is reversed on appeal, the immunity would apply to a retrial.

3. Petitioner's principal challenge is to the admissibility of evidence obtained by a recording device placed on the top of a bank of public telephone booths from which petitioner made calls (Tr. II, 6, 121). For about two weeks in February 1965, F.B.I. agents observed petitioner make telephone calls from a particular row of telephone booths in Los Angeles during certain hours on an almost daily basis (Tr. II, 6, 137). A check revealed that some of the calls were to a number in Massachusetts listed in the name of an individual known as a gambler (Tr. II, 6). Every day from February 19 through February 25, 1965, F.B.I. agents placed a recording device on the top of the bank of phone booths from which petitioner made his calls (Tr. II, 6, 121). Connected to the recorder were two microphones, which were taped to the outside of two of the booths[2] (Tr. II, 7, 122). Each day, as petitioner approached a certain spot about a block away from the telephones, agents in a radio car signaled the agents near the booths, who then attached the microphones. After petitioner had departed, the device was removed (Tr. II, 7, 126-127).[3] Tape recordings of petitioner's end of the conversations were obtained on all days except February 22 (when the recorder malfunctioned). They indicated

[2] The third booth was put out of order with the consent of the telephone company, which also gave its permission to the placing of the recorder and microphones (Tr. II, 7, 138).

[3] Despite these precautions, on one occasion a person entered the vacant booth while petitioner was making a call. Although the unknown person's voice was recorded, the recording was never played back (Tr. II, 140-141).

that petitioner was placing bets and receiving wagering information (Tr. II, 7).

The court of appeals ruled that the use of the recording device was legal and the tapes admissible in evidence under the authority of *Goldman* v. *United States*, 316 U.S. 129. In that case the Court upheld the admissibility of evidence obtained by a detectaphone placed by federal agents, stationed in an adjoining office, against the dividing wall of defendant's office. As in *Goldman*, the microphones used here were entirely outside the enclosure (a public telephone booth) in which petitioner's conversations took place.

The intrusion here was less substantial than in *Goldman*.[4] The agents took measures to ensure that no one, other than petitioner, using the booths petitioner frequented would have his conversation transcribed. Nor did they use the device with respect to petitioner until two weeks of surveillance and investigation indicated a strong likelihood that petitioner was using the telephones in question to violate the law.

Silverman v. *United States*, 365 U.S. 505, is not controlling here. There the Court held inadmissible evidence obtained by a "spike mike," which penetrated beyond the center of a party wall, made con-

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[4] One court has held that a public telephone booth is not a "constitutionally protected area" under the Fourth Amendment. *United States* v. *Borgese*, 235 F. Supp. 286 (S.D. N.Y.); cf. *Lanza* v. *New York*, 370 U.S. 139, 143-144. Whatever the validity of this ruling, it is at least clear that a public telephone booth is not generally considered as a private sanctuary, as is one's home or office.

tact with a heating duct and, in effect, made the duct "'a giant microphone, running through the entire house'" (365 U.S. at 509). Nor is there, as petitioner claims, any confusion with respect to the *Goldman* and *Silverman* decisions requiring their reconsideration by the Court. Where the lower courts have discerned no intrusion into a constitutionally protected area, they have followed *Goldman* and permitted evidence as to overheard conversations to be introduced. *Jones* v. *United States*, 339 F. 2d 419 (C.A. 5), certiorari denied, 381 U.S. 915 (heating panel removed in adjoining room; conversation overheard); *United States* v. *Pardo-Bolland*, 348 F. 2d 316 (C.A. 2), certiorari denied, 382 U.S. 944 (microphone taped over keyhole in adjacent hotel room and placed on floor on other side of common door); *Anspach* v. *United States*, 305 F. 2d 48 (C.A. 10) certiorari denied, 371 U.S. 826 (listening through double doors separating hotel rooms); *Corngold* v. *United States*, 367 F. 2d 1 (C.A. 9) ("scintillator" sensitive to radiation used in hallway outside defendant's apartment). Where, on the contrary, an invasion of a constitutionally protected area has occurred, the courts have followed *Silverman* and rejected the evidence obtained. *Clinton* v. *Virginia*, 377 U.S. 158; *Cullins* v. *Wainwright*, 328 F. 2d 481 (C.A. 5), certiorari denied, 379 U.S. 845 (microphone lowered down air shaft to level of defendant's apartment).

4. On the basis of the overheard conversations and other evidence, F.B.I. agents obtained a search warrant authorizing them to search petitioner's premises for "bookmaking records, wagering paraphernalia, including but not limited to, bet slips, betting mark-

ers, run down sheets, schedule sheets indicating the lines, adding machines, money, telephones, [and] telephone address listings * * *" (Pet. App. 22, n. 4).[5] Pursuant to the warrant, betting records were seized (Tr. II, 31-34, 210). Petitioner argues that the warrant was invalid, not only because founded on the evidence obtained from the recording device, but because it did not adequately describe the items to be seized (Pet. 8). This contention is without merit. The fact that the warrant mainly listed categories of things to be taken, rather than individual objects, does not render it invalid. Such categorization is inevitable in cases such as this, where the accused's particular method of keeping records could not be determined in advance. The warrant sufficiently identified the type of material to be taken. *Nuckols* v. *United States*, 99 F. 2d 353 (C.A.D.C.), certiorari denied *sub nom. Floratos* v. *United States*, 305 U.S. 626; *United States* v. *Clancy*, 276 F. 2d 617 (C.A. 7), reversed on other grounds, 365 U.S. 312. The fact that some improper items were taken[6] would not, as petitioner contends, render the lawfully seized items inadmissible. It is only when

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[5] The affidavit in support of this warrant, detailing all the evidence then gathered which led the agents to believe that petitioner was transmitting wagering information and bets in interstate commerce, appears at pages 18-19 of the Transcript, Volume I.

[6] On a motion to suppress, the court ordered some of the items taken during the search returned to petitioner on the grounds that they were immaterial to the charge against him or were "mere evidence" (Tr. II, 88-93).

seizable and unseizable matter are taken under an invalid (general) warrant or where the seizure is so widespread as to amount to a general search that material, though ordinarily seizable, becomes inadmissible. *Marcus* v. *Search Warrant*, 367 U.S. 717.

5. The contention (Pet. 9-10) that 18 U.S.C. 1084 is unconstitutionally vague because it applies only to those "engaged in the business of betting or wagering" is without merit. The fact that there might be borderline cases as to whether some particular person's activities are within the purview of the statute does not render its coverage impermissibly uncertain. *United States* v. *Petrillo*, 332 U.S. 1, 7; *Robinson* v. *United States*, 324 U.S. 282, 286. It is, of course, the government's burden to prove beyond a reasonable doubt that the accused is engaged in such business.

There is no interference with free speech in prohibiting the use of the facilities of interstate commerce to transmit "bets or wagers or information assisting in the placing of bets or wagers." "[I]t has never been deemed an abridgement of freedom of speech * * * to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language * * *." *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 502. See also *American Communications Assn.* v. *Douds*, 339 U.S. 382; *In re Rapier*, 143 U.S. 110; cf. 18 U.S.C. 1341-1343 (mail fraud).

6. Petitioner contends that 18 U.S.C. 1084 defines a continuing offense so that the eight telephone calls which he was charged in separate counts with making

could not each be made a separate crime. Since the $300 fines imposed for each violation were not made cumulative, the issue is not presented in this case. In any event, it seems clear that, once it is established that petitioner was "engaged in the business of betting or wagering", each separate act of interstate transmission of bets or wagering information might be charged as a crime. *United States* v. *Cohen*, 35 F.R.D. 227, 231 (N.D. Calif.) (dictum); see also *United States* v. *Teemer*, 214 F. Supp. 952, 958 (N.D. W. Va.) (construing a related statute, 18 U.S.C. 1952).

7. The evidence against petitioner is summarized in the opinion below (Pet. App. 16-19). It was more than ample to sustain the verdict.

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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